

Thymann v AFG Mgt., LLC
2014 NY Slip Op 31803(U)
July 9, 2014
Supreme Court, New York County
Docket Number: 650465/2010
Judge: Melvin L. Schweitzer
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action for an accounting must fail due to a lack of a special relationship between itself and Mr. Thymann.

Discussion

Motion to Extend Discovery

Mr. Thymann seeks additional deposition testimony from Mr. Pignatelli, arguing that AFG and its co-defendants have impeded meaningful discovery on his claims in this action. As indicated by AFG, this court already has limited what further discovery Mr. Thymann could conduct. Mr. Pignatelli has been deposed as an officer of AFG and during a second deposition, Mr. Pignatelli was again asked questions about AFG and its operations. It is not apparent what new information Mr. Thymann could obtain from a third deposition of Mr. Pignatelli, nor does it appear that Mr. Thymann will suffer any prejudice. As such the motion to extend Mr. Pignatelli's deposition is denied.

Legal Standard for Summary Judgment

CPLR 3212 (b) provides that:

[A summary judgment] motion shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the Court as a matter of law in directing judgment in favor of any party.

Summary judgment is warranted when there is no genuine issue of material fact that exists sufficient to require a trial. *See Andre v Pomeroy*, 35 N.Y.2d 361 (1974) (summary judgment awarded to plaintiff, as uncontested facts demonstrated defendant's liability); *Dauman Displays, Inc. v Masturzo*, 168 A.D.2d 204 (1st Dept 1990). The court's responsibility is not to resolve disputed issues of fact, but, rather, simply to assess whether there are any factual issues to be tried. *See McKinney v Setteducatti*, 183 AD2d 879 (2d Dept 1992).

The party moving for summary judgment bears the initial burden of establishing its right to judgment as a matter of law, and in this regard “the evidence is to be viewed in a light most favorable to the party opposing the motion, giving [it] the benefit of every favorable inference.” *Tronlone v Lac d’Amiante Du Quebec, Ltee*, 297 AD2d 528, 528-29 (1st Dept 2002). In order to overcome a motion for summary judgment, the party opposing summary judgment must produce admissible evidence sufficient to establish a material question of fact. *Amatulli v Delhi Construction Corp.*, 77 NY2d 525 (1991). “[M]ere conclusory assertions, devoid of evidentiary facts” or reliance on “surmise, conjecture and speculation” are insufficient to defeat a motion for summary judgment. *Smith v Johnson Products Co.*, 95 AD2d 675, 676 (1st Dept 1993); “it is well settled that ‘a shadowy semblance of an issue or bald conclusory assertions, even if believable, are not enough’ to defeat a motion for summary judgment.” *Mayer v McBrunigan Construction Corp.*, 105 AD2d 774, 774 (2d Dept 1984) (quoting *Gelb v Bucknell Press*, 69 AD2d 829, 830 (2d Dept 1979) (plaintiff awarded summary judgment where defendants were unable to produce more than conclusory assertions.) Summary judgment is an appropriate method to “eliminate unnecessary expense to named litigants where no issue of material fact is presented to justify trial against them.” *Donadio v Crouse-Irving Memorial Hospital*, 75 AD2d 715 (4th Dept 1980).

Breach of Fiduciary Duty

AFG alleges that Mr. Thymann’s cause of action for breach of fiduciary duty is duplicative of his cause of action for breach of contract. It is well established in New York law that a claim for breach of fiduciary duty cannot arise from the same facts that form the basis for a breach of contract claim. *See Kaminsky v FSP Inc.*, 5 AD3d 251, 252 (1st Dept 2004). There are two main instances where such a claim may be actionable. A defendant may be liable in tort

for a breach of fiduciary duty if “ a legal duty independent of the contract has been violated”, or when a defendant “has engaged in tortious conduct separate and apart from its failure to fulfill its contractual obligations.” *Bullmore v Banc of Am. Sec. LLC*, 485 F Supp 2d 464, 469-470 (SDNY 2007); *New York Univ. v Cont’l Ins. Co.*, 87 NY2d 308, 316 (1995). Further, where a contract provides for a party to take custody of another’s property and the custodian assumes unauthorized control over the property in question, the owner of said property “may seek redress by demanding damages intended to remedy such tortious misconduct.” *Ball v Cook*, 2012 WL 4841735, 2012 US Dist LEXIS 147380 (SDNY Oct. 9, 2012, No. 11-CV-5926 (RJS)).

Mr. Thyman argues that AFG’s alleged retention and dissipation of his funds constitutes a tortious action that exceeds the obligations set forth in the parties’ agreement. There is no evidence that suggests this alleged behavior is “separate and apart” from AFG’s contractual obligations. The only basis for this claim stems from AFG’s alleged failure to pay Mr. Thyman. Such an action is merely a violation of the contract between the parties. The assertion that AFG misused Mr. Thyman’s funds does not convert this action to something more than that.

Mr. Thyman makes a secondary argument that he seeks to recover commissions received by AFG during its period of alleged conversion of his funds, making the remedy distinct from what is attainable under a breach of contract claim. This argument is unpersuasive as well. The remedy needed to make Mr. Thyman whole in this matter would simply be the return of the funds due him with statutory interest, a point AFG itself has made in its cross motion. Unlike *Ball, supra*, this case does not involve independent property that has been retained, only a sum of money that Mr. Thyman argues he is owed.

Conversion

AFG argues that Mr. Thymann's cause of action for conversion is duplicative of his claim of breach of contract and must be dismissed. Mr. Thymann provides the same argument given in support of his breach of fiduciary duty claim, that a breach of contract may give rise to tort liability where a legal duty independent of the contract itself has been violated.

Clark-Fitzpatrick, Inc. v Long Island R. Co., 70 NY2d 382, 390 (1987). Additionally, Mr. Thymann asserts that a tort claim may coexist with a breach of contract claim even if the tort claim is connected with and dependent upon said contract. It is Mr. Thymann's case that AFG had extra-contractual obligations as the holder of his funds to return said funds when requested. It is alleged that by refusing to convey Mr. Thymann his monies, AFG has violated a legal duty separate and apart from the contract between itself and Mr. Thymann.

Much like the cause of action for breach of fiduciary duty, Mr. Thymann has failed to demonstrate any duty owed him by AFG that is separate and apart from the contract. Through its alleged withholding of funds due Mr. Thymann, AFG has done nothing more than violate the terms of the agreement between itself and Mr. Thymann. Any tort claim that would arise from the facts would not be connected with the contract but would in fact arise from the contract itself.

Mr. Thymann presents no separate legal duty that AFG was obliged to uphold aside from the turnover of funds due him. The obligation to deliver Mr. Thymann's funds when requested does not stem from any extra-contractual obligations but instead arises from the terms of the agreement itself.

Accounting

The right to an accounting can only be created by a confidential or fiduciary relationship. *See Poley v Sony Music Entm't, Inc.*, 619 NYS2d 923 (Sup Ct 1994). Mr. Thymann asserts that AFG owed him a fiduciary duty and even if one does not exist, the fact that Mr. Thymann entrusted AFG with his wages and AFG proceeded to abscond with the funds is a “special circumstance warranting equitable relief.” *Morgulas v J. Yudell Realty, Inc.*, 161 AD2d 211 (1st Dept 1990).

The relationship established between Mr. Thymann and AFG has not risen to the level necessary to establish a fiduciary duty or special agency relationship. While Mr. Thymann may have trusted AFG to represent his services and pay him his earned fees, the level of trust or confidence in this type of agreement is nothing more than that seen in a commercial transaction. *See Raske v Next Mgmt., LLC*, 977 NYS2d 669 (Sup Ct 2013). There is nothing to suggest that an agreement to acquire clients and provide compensation creates a fiduciary relationship. *Eden v St Luke's Roosevelt Hosp. Ct.*, 947 NYS2d 457, 459 ([2012]).

In determining whether a fiduciary relationship exists, courts may also look at whether one party has reasonably relied on the expertise or knowledge of the other. *Sergeants Benev, Ass'n Annuity Fund v Renck*, 796 NYS2d 77,79 (2005). There is no indication that Mr. Thymann has relied on AFG for anything other than locating photography assignments. Mr. Thymann has described himself as a world-renowned photographer with an already substantial clientele. It has never been alleged that he ever sought advice from or relied on AFG for anything other than what was stipulated in the agreement. With no evidence suggesting the existence of a fiduciary relationship, Mr. Thymann has no basis for his cause of action for an accounting.

Motion for Sanctions

Mr. Thymann's motion for sanctions stems from the latest deposition of Mr. Pignatelli. It is alleged that defense counsel's conduct was highly improper and unprofessional, and included repeatedly objecting to any inquiry involving the word/acronym "AFG", and giving improper instructions to Mr. Pignatelli not to answer questions. Counsel for AFG asserts that Mr. Pignatelli had been previously deposed about AFG's operations and that the April deposition was limited to the cause of action for conversion against Mr. Pignatelli personally.

This court already has stated that Mr. Thymann was limited to an additional four hours to question Mr. Pignatelli with respect to the claim of conversion against him and P59. Plaintiff already has had its chance to question Mr. Pignatelli in his role of President of AFG, and there was no substantive justification for giving him another deposition on that topic. Under the circumstances, no sanctions are warranted.

Conclusion

Accordingly, it is

ORDERED that AFG's motion for summary judgment is granted and Mr. Thymann's motion for sanctions and additional time for discovery is denied.

Dated: *July 9, 2014*

ENTER:

Melvin L. Schweitzer
J.S.C.

MELVIN L. SCHWEITZER